

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3
4 UNITED STATES OF AMERICA,)
5) Case No.
6 Plaintiff,) CR11-0070-RAJ
7) SEATTLE, WASHINGTON
8 v.)
9) May 4, 2015
10 ROMAN SELEZNEV,)
11) Motion Hearing
12 Defendant.)

13
14 VERBATIM REPORT OF PROCEEDINGS
15 BEFORE THE HONORABLE RICHARD A. JONES
16 UNITED STATES DISTRICT JUDGE
17

18 APPEARANCES:

19
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1 THE COURT: Good afternoon. Please be seated.

2 THE CLERK: We are here in the matter of the United
3 States versus Roman Seleznev, Cause No. CR11-70, assigned to this
4 court.

5 If counsel and the interpreters could please rise and make
6 your appearances for the record.

7 MR. BARBOSA: Good afternoon, Your Honor. Norman
8 Barbosa on behalf of the United States.

9 THE COURT: Good afternoon.

10 MR. LEONARD: Good afternoon, Your Honor. Russell
11 Leonard and Dennis Carroll here today with Roman Seleznev. We're
12 being assisted by two Russian interpreters, Linda Noble and Julia
13 Davidov.

14 THE COURT: All right. Thank you. Thank you for being
15 here.

16 I want to give, first, my instruction to the interpreters.
17 If at any point in time you wish to shift -- I'm not sure if you
18 have determined by time segments, half hour, 15 minutes, or
19 whatever protocol that you wish to use -- just let the court
20 know, put your hand up to stop the proceedings, and I will stop
21 the parties so we can make the proper transition.

22 It appears that the court's communication system is somewhat
23 defective today. It doesn't work as efficiently when we utilize
24 the headphone devices. So the interpreter is going to be
25 speaking directly to the defendant. It's not a problem for the

1 court, but I want to make it easy for the interpreters. So
2 please let the court know when you need to transition.

3 Will both of you agree to do that?

4 MS. NOBLE: Thank you, Your Honor.

5 MS. DAVIDOV: Yes.

6 THE COURT: And then we have the certifications from the
7 two interpreters as well?

8 MS. DAVIDOV: Yes.

9 MS. NOBLE: Yes.

10 THE COURT: Please stand and introduce yourself.

11 MS. NOBLE: Sure. Good afternoon, Your Honor. Linda
12 Noble. I'm state certified in Russian. My oath with the state
13 is current and on file with the AOC. And I am also sworn-in in
14 federal court.

15 THE COURT: That's the part that was missing. Thank
16 you.

17 MS. DAVIDOV: Good afternoon, Your Honor. For the
18 record, Julia Davidov, state certified in Russian. My oath is
19 current and on file with the Administrative Office of the Courts,
20 and I'm also sworn-in in federal court.

21 THE COURT: All right. Thank you.

22 We are here today for the two defense motions, motions
23 regarding the discovery and the issue regarding witnesses to
24 testify at the motion to dismiss. I believe those are the only
25 matters before this court, and essentially, a status conference

1 in terms of what things will look like by way of evidence
2 presentation for the motion to dismiss.

3 Is that the extent of the government's understanding of the
4 matters before this court?

5 MR. BARBOSA: Yes, it is, Your Honor.

6 THE COURT: Is that the defendant's understanding of the
7 matters before this court?

8 MR. LEONARD: We agree, Your Honor.

9 THE COURT: Counsel for the defendant, it's your motion.
10 Let's start first with your discovery motion.

11 And, counsel, please know I have had the chance to not only
12 review your materials that you filed on both of these issues, but
13 I have just about completed the process of going through the
14 motion-to-dismiss materials. But I can represent to you that I
15 have read the entirety of the transcript of the proceeding before
16 the judge in Guam. So I am familiar with that as well.

17 MR. CARROLL: Thank you, Your Honor. We appreciate it.

18 And with the court's permission, I will be arguing the
19 discovery motion, and Mr. Leonard will be addressing the issue
20 regarding witnesses.

21 Regarding the discovery, the defense seeks discovery related
22 to the government's efforts to capture Mr. Seleznev in the
23 Maldives. The defense, as the court knows, has moved to dismiss
24 the case based on the government's outrageous conduct in that
25 arrest. And this is an important issue. It's important to this

1 case; it's important to my client; I think it's also important
2 regarding the implications for U.S. law enforcement acting
3 overseas.

4 Regarding the motion to dismiss, the basic allegations are
5 that Mr. Seleznev, a Russian citizen, was vacationing in the
6 Maldives. There, he was detained by U.S. Secret Service agents
7 with at least some acquiescence, at least, of Maldivian police
8 agents. He was handcuffed by U.S. Secret Service agents,
9 escorted through the airport by the U.S. Secret Service agents,
10 and forced to board a plane to Guam.

11 During that time when he was removed or captured in the
12 Maldives, he was not allowed to see a judge, he was not given any
13 sort of due process, he was not allowed to see a lawyer, nor was
14 he allowed to see or call the consulate, the Russian consulate,
15 until he arrived in Guam.

16 And we've asked for discovery broadly related to that, the
17 government's efforts. And in my motion, I broke them down into
18 six different categories. The first two the government has
19 objected to, and they broadly group those as work-product
20 requests, and I think that's true in many respects. But I think
21 it's also helpful to break them down because, on the one hand,
22 we're asking for communications to the actual agents from U.S.
23 officials and, also, communications among the various law
24 enforcement agencies: the Department of Justice, the State
25 Department, the U.S. Attorney's Office. And I think it's

1 important to break it down because the communications to the
2 agents may implicate other issues, such as *Giglio* material or
3 impeachment material and things like that, particularly if the
4 agents were told that they should characterize the capture or the
5 arrest or the kidnapping of Mr. Seleznev in such a way to avoid
6 the legal implications regarding a possible defense motion to
7 dismiss for outrageous government misconduct.

8 The third area that is contested is the communications with
9 Russia that the Department of Justice has had in their efforts to
10 arrest/detain Mr. Seleznev.

11 Areas four through six are, basically, issues regarding the
12 government's communications with the Maldives or Maldivian
13 police and the government. The government said that they have
14 complied with that request. I included that in my memo just to
15 make sure that they have provided all of that and that they have
16 requested any such discovery from the relevant law enforcement
17 agencies and government agencies.

18 The government says that they have provided everything in its
19 possession. We take them at their word, as long as they have
20 requested that information.

21 THE COURT: Counsel, let me ask you a question. What
22 relevance -- Because I think that's the biggest objection by the
23 government, as it pertains to what did or did not take place with
24 Russia. The defendant was not arrested in Russia. The defendant
25 is a Russian citizen, without question, based upon the

1 representation of the parties. But what difference does it make
2 what took place regarding their attempts to communicate with
3 Russia; Russia's absence of an extradition agreement with the
4 United States? I'm curious. Because that's not really clear in
5 the briefing that you have provided to the court.

6 MR. CARROLL: Well, I think that there are two responses
7 to that. First, Your Honor, the standard for the motion to
8 dismiss is whether the government acted outrageously. And I
9 think one of the things that we would look at, such as in Title
10 III, warrants to do wiretaps, the government there has a duty to
11 exhaust all other possibilities.

12 And here, I think, looking at what steps they took to garner
13 the cooperation of Russia, Mr. Seleznev's home country where he's
14 a citizen, would go to the outrageousness of the government's
15 conduct.

16 I think, secondly, the government has indeed all but waived
17 any issues regarding its communications with Russia. The
18 government, on the one hand, in the response to our motion to
19 compel discovery, says, oh, that's not relevant, but in its
20 response to our motion to dismiss, the government has said, oh,
21 but we have tried, we have tried to get him through Russia, we
22 have notified the Russian authorities, and look what happened.
23 It looks like, at least to the government, that he changed up.
24 He changed his nicknames, and he changed his modus operandi. And
25 to that extent, the government has waived any claim that it's not

1 relevant.

2 They have also waived any claim of privilege regarding that.
3 The government can't, on the one hand, argue to this court, in
4 response to our motion to dismiss, trust us, but then fail and
5 refuse, in fact, to provide any discovery regarding this
6 information that they're asking you to rely on in denying our
7 motion to dismiss.

8 And the same is true regarding the internal documentation and
9 approvals and planning that took place between the agents and the
10 Department of Justice and the Secret Service and the State
11 Department. The government, in opposition to our motion, has
12 basically said, trust us, we got all the approvals that were
13 necessary to go forward with this operation. But then in
14 response to our motion for discovery, they have said, you can't
15 have it. And so they can't, on the one hand, argue that the
16 court should rely on their assurances, but then on the other hand
17 say, we're not going to give you any discovery regarding it.
18 And, therefore, the court should order that they provide
19 discovery on those things that they're asking the court to
20 consider in regards to the motion to dismiss.

21 THE COURT: Counsel, how do you get past the mandates of
22 16 (a)(2) where it cross-references and specifically identifies
23 what's protected? And it specifically identifies memoranda or
24 other internal government documents made by an attorney for the
25 government or other government agents in connection with

1 investigating or prosecuting the case.

2 So this crosses over not only to the portion of the motion
3 that you are going to cover, but it also covers the portion over
4 which witnesses will testify. I believe that would cover
5 Mr. Olson, the DOJ attorney. So I'm not asking you to cross over
6 into the boundary of your co-counsel's area of argument, but in
7 the area that you are arguing, how do you get past 16(a)(2)?

8 MR. CARROLL: Well, three things, Your Honor. First,
9 they have waived the issue. They have asked the court to rely on
10 their assurances that they have gotten approval. And we're just
11 asking for the discovery related to that.

12 Secondly, Rule 16 is not meant to be the minimum or the
13 ceiling for the discovery. It's not meant to put any limitation
14 on this court's authority to order additional discovery. As I
15 pointed out in my motion, the courts have long held that Rule 16
16 just sets forth the bare minimum that the government is required
17 to do, and the courts have the authority to order additional
18 discovery as necessary for each particular case.

19 And there are situations where courts have ordered
20 work-product type discovery. A *Batson* challenge requires the
21 government to reveal its strategy, its analysis for jury
22 selection. And the *Armstrong* case, which the government cites as
23 proof that they can never be ordered to reveal work product, in
24 fact does not say that. It just says that the defense has an
25 initial prima facie burden to meet before a court can order this

1 work-product information. But it is clear from that line of
2 cases that courts do have the ability to order that type of
3 information if a prima facie case has been made. And if the
4 court is inclined to impose that prima facie burden on us, I
5 would suggest we have already met it through the testimony that
6 was provided in Guam, where the Secret Service agent was directly
7 involved in the arrest of Mr. Seleznev. They're the ones that
8 handcuffed him, acting outside of their jurisdiction, forced him
9 on a plane to come to the United States.

10 In the U.S. Supreme Court, in *Brady* and in subsequent cases,
11 particularly *Agurs*, the court has broadly held that the defense
12 is entitled to discovery that tends to be favorable to the
13 defense. And this could be information that would be favorable
14 to the defense.

15 Now, if the court is inclined, it could conduct an in-camera
16 review. That would balance some of the protections of the work-
17 product privilege while also assuring the court that there isn't
18 favorable material within those documents. But, certainly, there
19 are situations where it's been ordered. And even if you look at
20 the cases that involved litigation regarding these *Ker-Frisbie*
21 claims, this outrageous government misconduct, the cases cited by
22 the government include information that is very similar and
23 exactly the same as what we are seeking.

24 If you look at the *Struckman* case, the Ninth Circuit case,
25 the beginning of the opinion describes an e-mail to the

1 Department of Justice trial attorney from the Regional Security
2 officer summing up their plan and why are they choosing to
3 execute a provisional arrest warrant in that case, and their plan
4 to revoke the defendant's visa, and all of the legal
5 ramifications that would follow, and why they would pursue that
6 goal; basically so the guy couldn't lawyer-up in Panama and try
7 to get a defense lawyer to slow things down and try to stay
8 there.

9 Also, the case there outlines an e-mail to the prosecutor
10 where they're basically saying, hey, a defense lawyer has been
11 sniffing around in Canada, trying to act on this person's
12 immigration claims. And so there, those were facts that were
13 discussed by the Ninth Circuit, they were clearly disclosed in
14 the course of the evidentiary hearing in that case, and they were
15 deemed relevant by the court in its analysis of the *Ker-Frisbie*
16 claim.

17 Likewise, in *Alvarez-Machain*, the U.S. Supreme Court case,
18 when you look back at the district court opinion, it includes
19 negotiations with representatives of the Mexican government and
20 their efforts to get the defendant, as well as efforts by the
21 DEA, to, basically, put out a bounty to anyone in Mexico who can
22 bring this guy to the United States and to capture and transport
23 him. And all of that information was brought out in the
24 evidentiary hearing. It was deemed relevant and important for
25 the court's decision.

1 And the defense here is in kind of a bind. You know, we're
2 being asked to comment on why this is so important without the
3 government telling us what's there. So they are, on the one
4 hand, hiding behind the privilege and saying we haven't made the
5 case for it. And that happens from time to time in various
6 situations. But I think the court should be careful in keeping
7 that in mind, the position that the defense is in and the
8 limitations that the defense has in these situations, where we're
9 just asking for it, they have got it, and we have no other way of
10 getting it. And the court rules do provide exceptions where work
11 product can be obtained if there's no other reasonable means
12 necessary for us to get that kind of information. And under
13 these facts and under these claims, I think it would be
14 appropriate in this case.

15 And I don't have anything else to add unless the court has
16 any other questions.

17 THE COURT: Well, let me ask you this question,
18 counsel -- the court hasn't, obviously, ruled on what I'm going
19 to do or which witnesses I'm going to allow to testify at the
20 hearing -- but if the court were to consider allowing a more
21 expansive approach and letting more witnesses than what the
22 government has proffered that they will allow to testify,
23 wouldn't the proper procedure be for examination to take place,
24 where these witnesses are subject to cross-examination, so that
25 you have some semblance of an idea of what might be out there by

1 way of discovery before you ask the court to open the vault and
2 just give you everything, when the court has some reservations as
3 to whether or not you have even established a prima facie case to
4 warrant the court granting your request?

5 MR. CARROLL: For some of these witnesses, such as
6 Olson, the government has said, we're not going to make him
7 available, we're going to assert a work-product privilege to
8 anything that this witness would have to say. So, you know, in
9 some ways, we're trying to promote judicial economy by raising
10 these issues with the court ahead of time so people don't maybe
11 necessarily have to travel from Washington, D.C. or elsewhere to
12 this court, so we have some idea of the scope of what we would be
13 allowed to pursue.

14 And, frankly, if they provide some of the information to us
15 and we were able to look at it, maybe we would say, never mind,
16 we don't want this person as a witness. But in the interest of
17 caution, we have asked that he be a witness for the hearing,
18 without us knowing exactly what it is that is in those memos.

19 THE COURT: Well, counsel, let me ask you, what value
20 would it be for you to bring a witness out here to testify,
21 that's a DOJ attorney, and for that witness to say and represent
22 to you that he can't answer that and claim attorney-client
23 privilege?

24 MR. CARROLL: Exactly my point, if the court would
25 uphold that privilege. That's why we're asking the court to rule

1 on the privilege issue ahead of time.

2 THE COURT: All right. Well, one of the things I'm
3 going to ask counsel is that you give the court some proffer,
4 some semblance of an idea, of what it is that you would ask the
5 DOJ lawyer, to the extent that you feel comfortable in sharing
6 that information with the court, so that I have an idea of how
7 expansive an approach that you plan on taking if that witness is
8 allowed or permitted to testify.

9 Anything further, Mr. Carroll?

10 MR. CARROLL: No, Your Honor.

11 THE COURT: All right. Thank you, counsel. You may be
12 seated.

13 Counsel?

14 And counsel for the government, you can do both arguments at
15 the same time.

16 MR. LEONARD: Thank you, Your Honor.

17 May it please the court, with respect to the court's last
18 inquiry, perhaps I will answer that first, related to Mr. Olson.

19 Mr. Olson is quoted, at one of the government's
20 attachments -- it's Attachment C to its response -- as having,
21 essentially, authorized this operation, provided the legal
22 authorization for the operation. But he did it with some
23 provisos or caveats, and I think that that's extremely important,
24 at least according to the discovery we have been provided.
25 Again, all we have is, basically, a secondhand reference to an

1 e-mail as quoted in the agent's report. So Olson got back to us
2 and said that the operation would be lawful and authorized,
3 basically, so long as the host country relies on its domestic
4 immigration law to enable them to act. So the DOJ lawyer is
5 saying that as long as the host country's laws are being followed
6 related to immigration, then he is providing, essentially, legal
7 cover or approval for the operation.

8 Well, that's something that we would certainly be interested
9 in inquiring about, is what additional -- certainly, that
10 condition -- any additional conditions that would be imposed by
11 the Department of Justice on the actions of its agents that were
12 not stated in the agent's report and summary of Olson's approval.
13 And that certainly is a relevant inquiry, in that if agents were
14 given instructions by the Department of Justice that authorized
15 the propriety of this operation that included some limitations or
16 some conditions, and they blew past them on the ground in
17 kidnapping our client, it should be fair game for counsel to ask
18 questions about and of great importance in helping the court
19 decide about this issue.

20 I guess there are kind of three categories of government
21 agent witnesses that we would ask the court to allow us to call,
22 and the government has already conceded two of these, I guess,
23 types of witnesses.

24 I suppose the easiest witnesses or the most obvious witnesses
25 to Mr. Seleznev's kidnapping, or what the government would like

1 to call -- I guess they don't want to call it an arrest; they
2 want to call it a detention. The most obvious and direct
3 witnesses related to that are the three agents that were on the
4 ground. So this is Agent Mark Smith, diplomatic security from
5 the State Department, and then Agent Schwandner and Agent
6 Iacovetti, both of whom are Secret Service agents. So those were
7 the three U.S. agents present in the Maldives at the airport who
8 handcuffed my client and forced him to get on a jet.

9 Their behavior in conducting that operation is central to
10 this motion. This is like the agents -- or the officers that
11 were present for a traffic stop. The government is claiming it
12 had authority to stop that car and arrest that person. Well, we
13 should be allowed to call the people who were there, who were
14 eyewitnesses to what other agents did, perhaps to what Maldivian
15 authorities did/said, what level of support and assistance they
16 received from those authorities or didn't receive from those
17 authorities.

18 Of those three witnesses, the government is indicating to us
19 that they will call Agent Smith, Agent Mark Smith. And what
20 we're hearing now is that Agent Smith was the agent most in
21 charge of this operation, who perhaps had the most contact with
22 Maldivian authorities in supervising this operation. So they
23 just want to call one of the three. And I will parenthetically
24 note that Agent Schwandner had previously been called as a
25 witness in Guam and examined by Mr. Seleznev's lawyers at the

1 time.

2 Again, we would assert that it's essential for us to be able
3 to question all three witnesses. We certainly agree with them
4 that Agent Smith is central here, but Agents Schwandner and
5 Iacovetti are equally important because of the role that I have
6 described.

7 With respect to Schwandner, the agent who testified in Guam,
8 the government's position is that, well, it's just duplicative,
9 Leonard; your client has already had a chance to cross-examine
10 this gentleman. Certainly his lawyer at the time was allowed to
11 cross-examine him with what information he had at the time, but
12 we have since received additional information. So additional
13 reports have been disclosed in discovery. Granted, they're not
14 voluminous reports, but nonetheless, we now have more information
15 than my client's former attorneys about this agent, what he said,
16 what he's written, what he purports to have done. And no lawyer
17 for Mr. Seleznev has had the ability to question him based on
18 this additional information. And so Mr. Carroll and I would ask
19 the court to allow us to do that.

20 With respect to the third witness in that first group, David
21 Iacovetti, also a Secret Service agent, although he was present
22 in the Maldives at the evidentiary hearing, the government chose
23 not to call him. So no lawyer has questioned him under oath, as
24 far as I know. I don't know if he was ever called before the
25 grand jury. But in any event, we have not had an opportunity to

1 examine him under oath with respect to this issue, his behavior,
2 his observation of other officers' actions, or his interaction
3 with Maldivian police or other Maldivian authorities.

4 So it seems to be that those three agents are -- It's clear
5 that we should be hearing from them, I would assume, then.

6 The second, I guess, grouping of agents appears to be
7 uncontested. So this is Mr. Lashinsky, or Agent Lashinsky. He's
8 an Assistant Regional Security Officer for the Department of
9 State.

10 On July 3rd, he sent the diplomatic note to the Maldivian
11 consulate or the Maldivian authorities from the U.S. consulate in
12 Colombo. And so we had initially asked that he be made
13 available. The government said they weren't going to, but then
14 they had some further conversation with him, and we were advised,
15 after that conversation, that they do intend to call him as a
16 witness. And I gather -- I won't speak for my learned
17 opponent -- but I gather from their papers that it's because he
18 did have significant interaction with the Maldivian authorities
19 in asking for their assistance, trying to secure their
20 assistance, hearing back from them that a warrant was being
21 sought from a Maldivian judge, that that warrant was on the way,
22 and apparently getting the bad news that that warrant had either
23 been denied or it was not going to be as forthcoming as initially
24 planned.

25 Whether there's additional information that Mr. Lashinsky or

1 Agent Lashinsky has to offer, we don't know. I had understood
2 from the conversations -- Let me just say that although we are
3 worried about, in general, transparency in any prosecution and in
4 ensuring that we have full discovery, I guess I appreciate the
5 lines of communication that exist between our respective
6 functions, and so we have had frequent discussions with counsel
7 about these issues. Nonetheless, I was hopeful that we would
8 receive some additional written reports by Agent Lashinsky based
9 on that renewed conversation between the U.S. Attorney's Office
10 and him just in the last week or so. We have not received word
11 to that effect. But, nonetheless, it appears uncontested that he
12 is a relevant witness. So we're glad that he's being called by
13 the government.

14 I guess I would say I don't know if we have discovered the
15 universe of U.S. agents who had other contacts with Maldivian
16 authorities beyond these three who were on the ground and
17 Mr. Lashinsky who was back in Colombo. I don't know. The State
18 Department doesn't share information with me on a routine basis.
19 I don't have a security clearance. You know, why would they,
20 unless they were ordered to by a court? So that agent is
21 important, clearly, by agreement.

22 Finally, we have the other agents that we have listed. This
23 is Mike Fischlin, who is the case agent; John Marengo, a special
24 agent who received a tip in the case; and Jeffrey Olson.

25 And I guess we listed Agent Fischlin, the case agent, because

1 I guess I have a sense that, being the case agent, he's perhaps
2 someone who is most aware of the investigation, is likely to have
3 additional information that could be of assistance to the court
4 and the parties in resolving any issues.

5 THE COURT: He testified in Guam, correct?

6 MR. LEONARD: He did, Your Honor. It was really,
7 solely, as -- the court probably has a better recollection of
8 this than I -- it was really related to identity, that issue that
9 was before the court, and also, I guess, the basis for the belief
10 that there's probable cause that a crime had been committed, the
11 support for the indictment itself.

12 THE COURT: That was the primary purpose of the hearing,
13 though?

14 MR. LEONARD: Certainly identity was the issue there, so
15 his testimony related to that.

16 Whether Agent Fischlin can provide additional information
17 about the operation on the ground in the Maldives beyond these
18 four others that we have identified, I don't know the answer to
19 that, frankly, Your Honor. But it seems to me, as the case
20 agent, it would be helpful to have him available. I believe he's
21 stationed here in Seattle, and so I just don't see what the
22 difficulty is for having that particular agent here.

23 Now, with respect to Marengo and Olson, we have spoken of
24 Olson's relevance earlier, in follow-up to Your Honor's questions
25 of my co-counsel, Mr. Carroll. Again, if this is an operation

1 that has been approved, not carte blanche, but with some
2 reservations and some express conditions, to us, to my mind, that
3 is exactly what we should be asking about here and trying to
4 ascertain as to whether agents were given conditions and then
5 violated them, decided not to follow them, when it became
6 untenable to follow them from their perspective, and still get
7 their man.

8 Our perspective is that those agents were there to get him.
9 They were there to get him, just about no matter what.

10 THE COURT: Well, counsel, again, how do you get past
11 the question of attorney-client communications and work product
12 as it relates to investigation or prosecution? Because just what
13 you shared with the court sounds remarkably like investigative
14 work that would appear to be protected under 16(a)(2).

15 MR. LEONARD: Well, Mr. Carroll has said it as well as I
16 could, just in terms of the exceptions that are available with
17 respect to Rule 16, *Brady*. But I guess what I would say is that
18 this doesn't sound like investigation. This sounds like someone
19 who is saying that here are the rules that you need to follow in
20 order to engage in this very unusual operation. I think we can
21 all accept this is something this is not routinely undertaken by
22 the U.S. government and U.S. agents.

23 THE COURT: So if counsel is giving an agent legal
24 advice as to what's within or outside the boundary of law, you
25 are saying that that's subject to disclosure, subject to

1 discovery?

2 MR. LEONARD: I think it becomes relevant not simply
3 because they waived it, the issues, but because if the testimony
4 is such that that legal advice was not followed, was either
5 ignored, abandoned, that certainly is a privilege -- the
6 privilege shouldn't cover violations of the directives of the
7 Department of Justice lawyer to agents in conducting an
8 operation.

9 I suppose that, you know --

10 THE COURT: Isn't a remedy for that, counsel, corrective
11 action as opposed to discovery? I mean, I'm trying to keep
12 things within the boundaries of where they're supposed to be.
13 And if an agent hasn't followed the directive, does that fit in
14 the rubric of what you are entitled to receive by way of
15 discovery, or is that sanctions for discipline in another area of
16 corrective action?

17 MR. LEONARD: I think it could be both, Your Honor.

18 And with respect to the relevance to the issue before the
19 court, in the defense's motion to dismiss, it clearly is relevant
20 that an agent has acted in the outrageous fashion as follows: He
21 was told by his government lawyer that he should do this the
22 right way, this way, with these conditions, and then he did it a
23 different way.

24 THE COURT: Now, counsel, do you have any evidence,
25 based upon either cross-examination or any discovery or any

1 written report that you have received or any communication that
2 the government has provided up to this point, that would indicate
3 that any law enforcement officer -- not just the ones in category
4 three -- that any law enforcement officer did not follow the
5 directives of either a lawyer or the Department of Justice or one
6 of these other entities' specific directives or parameters or
7 limitations on what they could and could not do in the arrest of
8 your client?

9 MR. LEONARD: We believe that Maldivian immigration law
10 was not followed in expelling Mr. Seleznev from the Maldives.
11 They did not follow the process whereby a person in the Maldives
12 is formally expelled under their immigration law.

13 The court probably has seen in the transcript of the
14 Maldivian hearing discussion about the various ways in which
15 someone can be excluded from the Maldives or sent out of the
16 Maldives, and we believe that they didn't follow that process.
17 His visa was stamped in exactly the same way that the agents'
18 visas were stamped in leaving the country. He was not formally
19 expelled by Maldivian authorities pursuant to their law. There's
20 a whole separate process, as we understand it, that would have
21 been engaged in doing that. And that's just related to
22 immigration law.

23 Had he been processed as an arrestee or a detainee by
24 Maldivian officials, he would have been delivered to a Maldivian
25 judge, he would have been given the right to counsel, he would

1 have had an opportunity to request and receive the assistance of
2 his consulate. And it's our belief that, in effect, that's what
3 was happening, he was being arrested. Instead of being delivered
4 to Maldivian legal authorities, he was treated just like a
5 tourist, his visa was stamped, but not like most tourists, he's
6 in handcuffs, and he is spirited onto a plane involuntarily by
7 U.S. agents.

8 So with respect to Olson, again, we think he is central to
9 understanding whether these agents acted in an outrageous fashion
10 in failing to follow the dictates of Maldivian law in processing
11 Mr. Seleznev's exit. And they did that for a reason. If they
12 had delivered him to Maldivian authorities, he wouldn't have been
13 released to them, and he would have been subject to Maldivian
14 legal process. And there's no extradition treaty between the
15 Maldives and the U.S. Again, in order for them to get their man,
16 they had to do this in the way that they did.

17 With respect to Mr. Marengo, Mr. John Marengo -- he's the
18 final person on the list, I guess, the third list of agents that
19 I have identified -- his sole connection, it appears, is to have
20 received the tip that Mr. Seleznev was in the Maldives. I
21 understand the government resists this. You know, it's
22 confidential information in the nature of a tip. And
23 Mr. Barbosa, I'm sure will ask, you know, what basis I have for
24 wanting this information; that I'm on a fishing expedition. You
25 just don't know what the relevance is of information that you do

1 not have. And that's where we are. You know, if this tip
2 involves some communication between U.S. agents and the Maldives,
3 then I think that that's something we need to know about. What
4 is the tip? And I guess I'm not necessarily asking for the
5 tipster's name and address, although that may well be relevant,
6 depending on the nature of this information. But this is the
7 shell game that we, unfortunately, feel like we're facing here,
8 Your Honor.

9 And with all due respect to my opponent's willingness to talk
10 to us and be open with us, we now feel like we have gotten to a
11 place where we can't resolve these issues amicably, and we need
12 the court's intervention.

13 Not unlike our position with respect to Mr. Olson, the court
14 has the ability to review materials in camera without it being
15 disclosed, and certainly helping us determine whether there's
16 relevant information through the use of the court's supervisory
17 powers here. We believe, at the very least, that step needs to
18 be taken.

19 So that is the sum of the government agents that we have
20 identified. And I will say that I don't know that we have gotten
21 to the bottom of it. I do not know that. And in part, that's
22 because, you know, you never know what you don't know.

23 So I would ask the court to allow us to call the witnesses
24 that we have been able to identify.

25 THE COURT: All right.

1 MR. LEONARD: Thank you.

2 THE COURT: Thank you, counsel.

3 Counsel for the government?

4 Just one second here.

5 MR. BARBOSA: May I proceed, Your Honor?

6 THE COURT: You may.

7 MR. BARBOSA: Thank you.

8 So we have two issues today, the motion to compel, as well as
9 the scope of the evidentiary hearing, if there's going to be an
10 evidentiary hearing. And I want to strongly encourage the court
11 to consider that an evidentiary hearing isn't necessary.

12 I think your question to counsel a moment ago about whether
13 they had any evidence to support their theory is the key to the
14 problem here. They don't have a cogent theory that would entitle
15 them to dismissal of the indictment, accepting everything that
16 the defendant has alleged. I counted at least six times that
17 Mr. Leonard said, "We don't know"; "We don't know what we don't
18 know." They don't have a theory. And that is the classic
19 definition of a fishing expedition that the Supreme Court has
20 said that defense cannot go on unless they make a substantial
21 prima facie showing to support this discovery that they're
22 demanding, let alone an evidentiary hearing in which we haul
23 witnesses from all over the country, and at least one witness
24 from Sri Lanka, to come testify at a hearing that could last at
25 least a couple of days, if not more, depending on the scope of

1 how they wish to expand it.

2 We believe we have already produced more than enough
3 discovery. In fact, we have produced discovery that we are not
4 required to produce under any standard. The discovery we have
5 provided includes all of the agent reports regarding the planning
6 and execution of this operation. There's only two. There's a
7 Secret Service report and the report of Special Agent Smith, the
8 State Department agent. We also provided a copy of the Interpol
9 Red Notice to the Maldives, which is the closest thing to an
10 international arrest warrant. There is no such thing, as defense
11 pointed out. That's the closest thing to an international arrest
12 warrant. It's what the Maldives requested when they communicated
13 back to the United States what they wanted in order to cooperate
14 with our request that they turn him over. And that described
15 accurately the nature of the charges against Mr. Seleznev and the
16 scope of this case.

17 We also provided all written communications between U.S. and
18 Maldivian law enforcement, and that includes the official
19 diplomatic note, again, describing, at length, the nature of the
20 charges and accurately describing the nature of the evidence
21 against Mr. Seleznev. And we also disclosed all e-mail
22 communication between U.S. authorities and the Maldivian
23 authorities, which is very little. It did not take a significant
24 amount of discussion.

25 There were a couple of phone conversations, at least a few,

1 between Special Agent Lashinsky, or Regional Security Officer
2 Lashinsky, and his Maldivian police counterparts. And I believe
3 there was some communication between Special Agent Smith and his
4 Maldivian counterparts to, basically, arrange the logistics of
5 him coming there, as well as the on-the-ground communications.
6 But everything written has been disclosed. And we also have
7 extensive testimony --

8 THE COURT: Counsel, I want to clarify. When you say
9 "everything written has been disclosed," is that an affirmative
10 representation that there are no other writings that could be
11 disclosed or that would be subject to in-camera review by the
12 court?

13 MR. BARBOSA: Absolutely, between the Maldives and U.S.
14 law enforcement. We have combed the e-mail boxes of everybody
15 involved in this, in the arrest operation. Agent Smith, RSO
16 Lashinsky, Agent Iacovetti, Agent Schwandner. Agents Iacovetti
17 and Schwandner had no communications with the Maldives
18 independent of Agent Smith. Basically, on the ground. They were
19 there for the meetings.

20 And that makes sense, because it's the State Department that
21 is responsible for communicating with foreign governments. It
22 was the State Department's role in this operation to arrange the
23 cooperation of the Maldivian authorities.

24 THE COURT: Are you also representing that there are no
25 written communications that have not been disclosed that were

1 prepared or authored by the State Department?

2 MR. BARBOSA: By the State, yes. The diplomatic note,
3 the written communication from the State Department.

4 THE COURT: And there's nothing --

5 MR. BARBOSA: The foreign communications are very
6 formal, yes. There's nothing else, other than the e-mails, as I
7 said, that have been disclosed, and the diplomatic note.

8 And then we have the testimony of Special Agent Schwandner at
9 the hearing, which was extensive and subject to cross-
10 examination. They engaged in this very fishing expedition in
11 Guam and got nowhere because, as the judge in Guam pointed out
12 repeatedly -- you mentioned you have read the transcript -- and
13 she was beating them up with, "Counsel, you don't have a theory
14 that provides you with relief, no matter what you say here, or
15 proof. All of these allegations fail as a matter of law." And I
16 think we're in the same boat now.

17 THE COURT: But most of those conversations, counsel,
18 weren't those in the context of the shocking and outrageous
19 conduct?

20 MR. BARBOSA: Yes.

21 THE COURT: Okay.

22 MR. BARBOSA: I mean, that's the only basis for
23 dismissal in a case like this. That would be if the United
24 States engaged in some shocking and outrageous conduct, which has
25 been very, very narrowly defined. At best, at best, there are

1 two exceptions: Torture. Not on the table. All he's described
2 is the agent aggressively waving this indictment in front of his
3 face and maybe pushing him into a couch. That is clearly not
4 torture under any reading of the case law. So the only other
5 possible exception is this very narrow exception in the *Struckman*
6 case in the Ninth Circuit, which I pointed out is in dicta. And
7 I would not concede that it's actually a valid exception. We
8 would certainly wish to preserve that for appeal. It's this
9 narrow exception for the remote possibility that what they call
10 "blatant lies" had somehow encouraged the foreign government to
11 cooperate in handing over the defendant. They haven't alleged
12 any blatant lies either, or any lies whatsoever, which makes
13 sense, because if we look at the discovery we have produced,
14 which is extensive, we have all of the communications with the
15 Maldives, and they're fully forthright and consistent with the
16 facts of the case. There's nothing even remotely misleading.

17 So there's no basis to believe that any misleading statements
18 were made to the Maldivian authorities, which runs them into a
19 wall in terms of their demand for discovery and their demand for
20 an evidentiary hearing.

21 On the discovery, we have to start with Rule 16. While not
22 the only basis for discovery, the Supreme Court has pointed out
23 that there's no constitutional rights to discovery. Rule 16 is
24 what governs it. And in *Armstrong*, the court very clearly held
25 that Rule 16 does not entitle a defendant to discovery on these

1 types of independent claims of misconduct.

2 Rule 16 is limited to discovery that goes to the merits of
3 the case, things that are going to be introduced at trial;
4 defensive issues not related to the initiation of the
5 prosecution, or for, in this instance, the arrest. And if you
6 look at *Armstrong* and the cases, as counsel pointed out, those
7 were discussing requests for access to discovery in *Batson*
8 challenges and selective prosecution claims based on matters that
9 go to the heart of our most cherished constitutional rights.

10 Here we have a defendant arrested in a foreign country, not
11 alleging that he was arrested based on his race or his gender or
12 anything that is protected under our Constitution. At best, he
13 is alleging violations of foreign law that, under controlling
14 Supreme Court precedent, cannot entitle him to the relief that
15 he's requesting.

16 So under *Armstrong*, he has to come forward, and his burden is
17 to come forward with a substantial prima facie showing of some
18 misconduct that would entitle him to relief. As we have seen,
19 they have not settled on a theory of what that misconduct can be.
20 All they can say is, we don't know what we don't know. That
21 cannot be enough to support the expansive discovery request that
22 he's demanding, let alone the many witnesses that they're
23 requiring or demanding that we require come to court.

24 And I want to point out, this would not be the first court to
25 address these types of claims in this manner by accepting the

1 defendant's allegations as true, applying somewhat of a summary
2 judgment standard to it. Several district courts have done this.
3 In fact, it has become, basically, the method of handling these
4 types of claims. The district court in Guam did this. And just
5 last May in *United States v. Al Libby*, a Southern District of New
6 York case -- and that's a court that sees a lot of cases like
7 this because of all the international prosecutions there -- the
8 court did the same thing and denied a motion to dismiss for
9 outrageous conduct in which the defendant there had alleged that
10 he had been kidnapped by U.S. Army Delta Force rangers. Even
11 though the defendant was alleging that he was kidnapped with the
12 use of extreme physical and brutal force, bound, gagged, and
13 trussed up, and the soldiers used Taser-like weapons on him, the
14 court refused to hold an evidentiary hearing on that motion.
15 Likewise, in *U.S. v. Yousef*, which is another SDNY case that
16 defense has cited in their motion, the court denied a motion to
17 compel discovery and denied an evidentiary hearing under the same
18 theory; that accepting all of the allegations, they just didn't
19 get the defendant anywhere.

20 THE COURT: Let me make sure, counsel. In going through
21 the transcript, it almost appeared that it was teed up for an
22 evidentiary hearing or a subsequent evidentiary hearing based
23 upon what the judge was stating, indicating that, "Well, with the
24 discovery that you have," and statements to that effect. So it
25 almost gave the appearance, I believe, that it caused the defense

1 to believe that you are going to get another opportunity in
2 another court, meaning Seattle, to raise these issues: one, the
3 motion to dismiss, and, also, the discovery issues.

4 MR. BARBOSA: I think that is a misreading of it. And
5 you have to examine the context of where we're at. That was a
6 very unusual proceeding.

7 We still take the position that the expansion of that
8 hearing, beyond a Rule 5 identity hearing, was way beyond the
9 bounds of what a Rule 5 or Rule 24 hearing, under the rules,
10 should be holding. And so it was an odd hearing. And as you can
11 see from the transcript, the court goes about ruling on the
12 motion, but then we end up having several hours of testimony on
13 it.

14 Yes, the court did say that Mr. Seleznev could raise this
15 when he gets to Washington, and we were saying that this is the
16 proper court to file his motion. But filing your motion, making
17 your allegations, is a step before the court deciding that
18 there's some merit to them and they should have an evidentiary
19 hearing. He should still have to meet some burden of alleging
20 some facts and providing that substantial prima facie showing
21 that entitled him to more than just filing the paper. Just
22 alleging that the prosecution has committed misconduct or the
23 government has committed misconduct shouldn't entitle you to a
24 full-blown hearing and discovery, let alone discovery to, as you
25 pointed out, privileged documents.

1 I mean, we're not drawing a line here at documents or
2 discovery that just helps our case. We're drawing the line very
3 far back at only clearly privileged discovery or completely
4 irrelevant discovery. For example, the matters related to our
5 dealings with the Russian government just cannot have any bearing
6 on this hearing whatsoever. We're not drawing it based on what
7 helps our case. There's no *Brady* or *Giglio* information in any of
8 the other matters that they have requested. We're just trying to
9 draw a principled distinction based on clear lines of privilege.

10 And I will just point out, because I have cited a couple of,
11 you know, Southern District of New York cases, not of any
12 precedential value here, but the Ninth Circuit has also applied
13 this similar standard of, accepting the defendant's allegations
14 as true, they still don't get relief. And that was in
15 *Matta-Ballesteros*, which was a rather extraordinary case. In
16 fact, while defendant said no court has refused to produce
17 discovery, it's actually the opposite. No court has ever granted
18 discovery on these kind of matters. Other courts have held
19 hearings on them, but there's been no litigation related to the
20 scope of discovery that those defendants were entitled to. None
21 of those cases addressed discovery.

22 So when you compare this case to all of those that have come
23 before, with much, much more significant allegations of
24 government misconduct, primarily involving allegations of
25 torture, with allegations that are so much less compelling, it

1 just doesn't seem appropriate to grant discovery or the
2 evidentiary hearing.

3 To the extent we're going to have an evidentiary hearing, we
4 are prepared to bring two witnesses. I apologize if counsel was
5 confused by our earlier conversation. We're not conceding that
6 those witnesses are necessary, but we're willing to bring them.
7 What we need to know is, what is the scope of the hearing, what
8 are the legally relevant issues that the court wishes to address?
9 Because we need that in order to determine which witnesses we
10 should bring and to prepare those witnesses to address the right
11 issues. But as I have indicated, I think the scope of this
12 hearing should be very narrow, because at best, at best, it seems
13 like the one potential for relief would be this claim or at least
14 the theory -- they haven't actually made a claim -- but the
15 theory that U.S. agents engaged in misconduct by misleading the
16 Maldivians. And that should be limited to the officers or agents
17 who were responsible for actually communicating with the
18 Maldives. And that's the two State Department employees.

19 The defendant, on the other hand, is demanding that we bring
20 in at least five other witnesses, potentially more, and that
21 includes a Justice Department attorney whose testimony would,
22 unquestionably, be privileged in this matter. I don't believe
23 the factual disagreements that any of these other witnesses would
24 address are relevant to the court's determination.

25 And I think it's necessary to kind of go down the list of

1 what defense claims these witnesses would somehow address. They
2 repeatedly refer to kidnapping. That's his primary allegation.
3 In fact, most of what he's arguing here revolves around this
4 claim that the government kidnapped him from the Maldives and
5 that that is somehow conduct that shouldn't be condoned by the
6 court. The problem with that theory is that, under the
7 *Ker-Frisbie* doctrine, the Supreme Court and the Ninth Circuit
8 have repeatedly found that kidnapping is okay, it is permissible.
9 Despite this clear precedent, they focus on claims, for example,
10 that the U.S. agents were, quote, personally and directly
11 involved in his kidnapping. But the Supreme Court in
12 *Alvarez-Machain* and the Ninth Circuit in *Matta-Ballesteros*
13 addressed those exact same type of circumstances.

14 In *Alvarez-Machain*, which is the key case to review for
15 preparation of this hearing, the district court specifically
16 found that Alvarez-Machain's abductors were, quote, paid agents
17 of the U.S. Drug Enforcement Agency. And the Supreme Court found
18 that that was perfectly okay, totally irrelevant to whether or
19 not he could have his case dismissed.

20 In *Matta-Ballesteros*, the Ninth Circuit found the personal
21 and direct involvement of the U.S. marshals in the defendant's
22 abduction equally irrelevant. And in the *Yousef* case, which
23 defendant cites for the proposition that the court denied
24 Yousef's motion based on the fact that there wasn't enough
25 evidence that there were U.S. agents involved, the court actually

1 held, quote, the motion to dismiss fails as a matter of law,
2 taken as true every fact Yousef alleged and assuming that his
3 kidnappers were U.S. government agents. He couldn't overcome the
4 *Ker-Frisbie* bar. So, clearly, whether or not U.S. agents were
5 involved cannot be a relevant fact that we need to address.

6 The defendant also argues that it is somehow more outrageous
7 if the U.S. government kidnapped a person without the host
8 nation's consent and participation, so focusing on this issue of
9 whether or not the Maldives cooperated or not. But *Alvarez*
10 controls here, too, because in that case Alvarez was forcibly
11 kidnapped from Mexico, and Mexican government officially
12 protested the kidnapping. In fact, they submitted amicus briefs
13 on his behalf to the Supreme Court, and the court held, again,
14 not enough, that is not enough, unless there is a violation of
15 the express terms of an extradition treaty, which doesn't even
16 exist here.

17 So when defense claims that circumventing another country's
18 legal system or running roughshod over their immigration, that it
19 could be outrageous conduct, that is not so, because kidnapping,
20 by its very nature, does violate the other country's judicial
21 process; it does violate international law. It unquestionably
22 would violate Maldivian law. But it doesn't matter under the
23 case law whether or not those things happened. So he cannot get
24 a motion to dismiss based on that, which knocks out much of the
25 testimony that they are proposing we present, including any of

1 the testimony -- especially additional testimony from Agent
2 Schwandner or testimony from Agent Iacovetti.

3 The same thing applies to his theory that circumventing the
4 host nation's judicial process would be somehow outrageous
5 misconduct. *Alvarez*, again, controls, because in *Alvarez* the
6 exact same thing happened. This goes to their theory that the
7 government approached a Maldivian judge and asked for a warrant.
8 Well, in *Alvarez*, the United States approached the Mexican
9 government and asked for assistance in getting Alvarez out of the
10 country. And when they didn't comply, when they didn't provide
11 assistance, the United States took matters into their own hands,
12 kidnapped him, and the Supreme Court held that was okay. So,
13 again, that has been foreclosed by Supreme Court case law.

14 That leaves us with just the one possibility for looking into
15 whether or not the government misled Maldivian authorities. I
16 want to make sure it's clear that all of the witnesses beyond the
17 two State Department employees had no communications or no
18 interaction with the Maldivians, with the exception of the
19 incidental contact that Agents Schwandner and Iacovetti would
20 have had on the ground. But none of that contact was decisional.
21 It had nothing to do with the process of getting the cooperation
22 of the Maldivian authorities. And, in fact, all of their
23 meetings without Smith present were after the Maldivians had
24 already informed the United States that they were willing to
25 cooperate.

1 So on all of that, we believe that a hearing is just
2 unnecessary, and the defendant hasn't made enough of a showing to
3 either require discovery or require an evidentiary hearing. And
4 it's not that we're running away from these facts. We have
5 provided extensive discovery related to it.

6 The only other matter I want to address is, there's a claim
7 that we waived our arguments against discovery by producing the
8 amount of discovery that we did produce. As an initial matter,
9 counsel acknowledges we had an express agreement with prior
10 counsel that the limited production we were making would not
11 waive our arguments of privilege. And on top of that, if you
12 were to hold that we have waived our privilege, waived our right
13 to object to further discovery, that would basically amount to
14 punishing the government for engaging in the very transparency
15 that they are saying we should be encouraging. If we have to
16 stand firm always on every privilege, then it is going to be in
17 no one's best interests in getting matters like this addressed in
18 a more timely and efficient manner and fashion.

19 We are trying to be transparent. The problem they have run
20 into is that the discovery they're getting just doesn't have the
21 answers they want, and that's because there was no misconduct.
22 None of this amounts to anything inappropriate.

23 So we would ask the court to, at the very least, limit it to
24 the two State Department witnesses, but we would very much
25 encourage the court to consider cancelling the evidentiary

1 hearing.

2 THE COURT: All right. Thank you, counsel.

3 Counsel, any new or additional argument not previously
4 presented to the court?

5 MR. LEONARD: Thank you, Your Honor.

6 And because the government addressed, essentially, its
7 request for reconsideration that we have a hearing at all, I
8 would like to address that in brief, Your Honor.

9 THE COURT: Counsel, just save your argument. We're
10 going to have a hearing. But you can go on to the next issue.

11 MR. LEONARD: With respect to the scope of the hearing,
12 Your Honor, the *Ker-Frisbie* doctrine has two exceptions, as we
13 have outlined in our papers: failing to follow an extradition
14 process that is in place, and outrageous conduct, shocking and
15 outrageous conduct.

16 We argued in our brief on the motion to dismiss that we
17 believe the court should take a closer look at the failure-to-
18 follow-an-extradition-treaty prong. This is a novel theory upon
19 which we are requesting the court to grant relief. But, you
20 know, if there isn't an extradition treaty, that shouldn't mean
21 that the government gets to do whatever they want.

22 Our argument is, in the absence of an extradition treaty, the
23 government should revert to the law of the land on which they are
24 present: the Maldivian legal system, its protections with
25 respect to detention, its protections with respect to

1 immigration. And although the case law at this point doesn't
2 necessarily say that that's a basis for relief under the first
3 prong, we believe that that extension is a logical extension of
4 that prong, and we will be arguing that point to the court.

5 With respect to outrageous conduct, as counsel noted, there
6 are kind of two types of conduct that have been recognized as a
7 violation upon which relief may be granted. The fact that there
8 are just two types of misconduct doesn't mean that there couldn't
9 be others recognized by the court. It doesn't mean that those
10 were exclusive, that those are the only possible ways in which a
11 court could find conduct so outrageous as to warrant relief. And
12 so the government points to those as if they're a limitation.
13 The case law doesn't make them a limitation. It simply offers
14 them as examples, really, illustrative examples.

15 And we effectively concede that there isn't any torture here.
16 But with respect to blatant lies and other measures of
17 outrageousness, you know, Mr. Civile's words are ringing in my
18 ears, to a certain degree. At the very least, we should be
19 thinking about this as what we want to be seen as a country and
20 the evolving standards of justice that I think we can all hope
21 for and aspire to. And approving of agents committing felonies
22 in order to secure my client's presence in court is not my idea
23 of evolution in terms of the progress of the law and our
24 diplomatic approach to other countries in the world.

25 Nonetheless, that isn't the only issue here. Again, the

1 court, in reading the cases, this is not an exclusive list.
2 Kidnapping being okay. Well, I guess I think it shouldn't be.
3 And perhaps we are moving towards a world where we can reach
4 those kinds of conclusions through the rule of law, that
5 kidnapping shouldn't be okay.

6 So we do believe that there are layers of outrage here, not
7 simply what would be criminal conduct in the Maldives, but also
8 in disregard of the notions of the rule of law; communications
9 here or that there was some effort to secure the Maldivian
10 authority's legal approval, and yet that was abandoned.

11 So there's more here than simply a kidnapping, and we think
12 we should be able to explore that in detail with the witnesses
13 that we have outlined.

14 Thank you.

15 THE COURT: All right. Thank you.

16 MR. LEONARD: I believe Mr. Carroll has a point or two
17 to make with respect to the motion to compel.

18 THE COURT: All right. Thank you.

19 MR. LEONARD: Thank you.

20 THE COURT: Mr. Carroll.

21 MR. CARROLL: Thank you, Your Honor.

22 Just two points: In my reply memo where I raised the waiver
23 issue, I explicitly said that I'm not arguing waiver because they
24 have disclosed this information. I have raised waiver because
25 they have asked the court to rely on that information. They

1 could have responded to our motion to dismiss by saying none of
2 this is relevant; you know, it doesn't matter whether we
3 consulted with -- tried to get him through Russia; it doesn't
4 matter whether we got approval. Instead they're asking the court
5 to rely on that. And that, I think, is where the waiver comes
6 in.

7 And, secondly, it is true that none of the courts that have
8 addressed the *Ker-Frisbie* claims specifically went to the issue
9 of discovery. But I, again, would point to the *Struckman* case
10 where this very type of discovery was provided, this very type of
11 information was relied upon by the Ninth Circuit in its opinion.

12 Thank you.

13 THE COURT: Thank you, counsel.

14 MR. BARBOSA: Your Honor, one matter real quick on
15 *Struckman* that I forgot to point out, and counsel's reference to
16 it reminded me. In *Struckman*, I think it's important to note
17 that in that case they actually had evidence of a false statement
18 to the Panamanian authorities. Defense counsel did submit a
19 letter from the Regional Security Office to the Panamanian
20 authorities that misstated the nature of the charges. And we
21 don't have that here.

22 As to the scope of the hearing, I would just suggest that if
23 we are going forward with the two agents from the State
24 Department, I would propose that the government call them in
25 direct and that the defense cross them. This would avoid

1 potential *Touhy* problems in terms of the defense getting approval
2 to call them from the State Department, which could be somewhat
3 complicated.

4 Thank you.

5 THE COURT: All right. Counsel, the court is going to
6 make the following determinations. First I will rule on the
7 motion to compel.

8 The motion to compel lists six different categories of
9 information. I will note, first of all, that Footnote 1 on the
10 Document Entry No. 130, page 3, regarding Requests 4 through 6,
11 that the defense indicates that that information has been
12 provided. And my reading of that footnote would suggest to the
13 court that that's a concession by the defense that the discovery
14 has been provided, but they only make the request out of an
15 abundance of caution. The court doesn't believe that further
16 action is required by the court. The court is satisfied that,
17 based upon the representation of the government and the
18 concession of the defendant, that the request for additional
19 discovery as it relates to Requests 4 through 6 are denied.

20 Request No. 3 relates to the Mutual Legal Assistance Treaty.
21 The court finds that that's irrelevant for a number of reasons.
22 First, the defendant was not arrested in Russia. The defendant
23 was clearly arrested in the Maldives. Second, the MLAT -- for
24 the court reporter, that is M-L-A-T -- is not an extradition
25 treaty. It's only a vehicle to provide assistance in obtaining

1 evidence and testimony. And, third, Article 61 of the Russian
2 constitution prohibits extradition of its citizens. And the
3 discovery sought by the defense regarding utilization of the MLAT
4 for assistance in collecting evidence in Russia for purposes of
5 the subject investigation is irrelevant. Therefore, the motion
6 for additional discovery as it relates to Request No. 3 is
7 denied.

8 Request No. 2, the request, on its face, clearly appears to
9 this court to be communication between the attorney representing
10 the United States Attorney's Office, the Department of Justice,
11 and the Office of Internal Affairs. The court rules that such
12 disclosures are clearly work product, exempt pursuant to
13 16(a)(2), and also, the court believes that Request No. 2
14 should be denied.

15 This leaves merely Request No. 1. As currently drafted,
16 first of all, the court notes the request is overbroad as it
17 seeks production far beyond what the defendant is entitled to.
18 The court concludes the same ruling that relates to Request
19 No. 2 will equally apply to Request No. 1, and it is denied.

20 The essence of relevant discovery has already been produced
21 to the defendant. No case authority by the defendant supports
22 the extent of this discovery as required or requested.

23 The *Armstrong* decision, while relevant, does not reach the
24 scope of discovery requested by the defendant, and the
25 circumstances are significantly different from the facts as

1 presented before this court.

2 This puts us to the next and the last question, the ruling on
3 additional witnesses.

4 Now, first of all, some of these witnesses that counsel
5 requests do not reside in the United States. Strike that. Do
6 not reside in the Seattle area, and it requires significant
7 travel.

8 Is there any objection to any of these remaining witnesses,
9 not the other two the government has already indicated,
10 testifying by way of video testimony? Counsel for the defense?

11 MR. LEONARD: No, we would have no objection to that,
12 Your Honor.

13 THE COURT: All right. Then other than the two
14 witnesses identified by the government, the other witnesses will
15 be permitted to testify by video.

16 That means, counsel, we probably won't have the evidentiary
17 hearing in this courtroom. We don't have the capabilities to
18 make that happen in this courtroom. It will be on a different
19 floor. You can check with the in-court deputy. We can make
20 arrangements.

21 MR. BARBOSA: Your Honor, I can affirm to the court that
22 we will bring those witnesses because of the importance of this
23 hearing to the Secret Service. All of those agents would
24 absolutely travel for this testimony.

25 THE COURT: All right. Then I will go through the

1 witnesses and identify who will be testifying and who will not be
2 testifying.

3 Lashinsky, L-a-s-h-i-n-s-k-y, and Special Agent Mark Smith
4 are the two identified that the government plans to call. They
5 will be required to testify.

6 As it relates to Schwandner, who testified in Guam, and
7 Iacovetti, who was never examined by the defense or counsel, both
8 will testify or at least be available.

9 Again, the court has no objection if you wish to make those
10 witnesses available for testimony by way of video testimony.

11 The court would note that the basis for the court's
12 determination for some of these witnesses, including these last
13 two, is that discovery was provided subsequent to the hearing
14 that took place in Guam. These witnesses were not examined as it
15 relates to any discovery that was provided. Now, it may not
16 relate to the testimony they offered, but nonetheless, the
17 defense should be entitled to examine these witnesses with the
18 additional discovery.

19 The next witness is Jeffery Olson, the Department of Justice
20 trial attorney. The court will sustain the objection by the
21 government lawyer. The court has not been satisfied by any
22 proffer by the defense of any theory or justification to support
23 invading the attorney-client privilege or work-product privilege.
24 The court is satisfied that the limitations of Rule 16(a)(2)
25 certainly preclude testimony or evidence as it relates to the

1 investigation or prosecution of the case.

2 Special Agent John Marengo, M-a-r-e-n-g-o, there's no
3 indication he had any interaction with the Maldivian authorities,
4 and the defense has not proffered to the court any justification
5 to show that he had any contact with Maldivian authorities.
6 Counsel for the government has provided the defense with written
7 discovery, written communications, the extent of all
8 communications that were taking place as Mr. Seleznev was
9 arrested, and there's no indication that he had any contact or
10 communication which would support him being examined. So to that
11 extent, that request is denied.

12 I believe the last one is Fischlin, F-i-s-c-h-l-i-n. He
13 testified in Guam, but it was before discovery, so the court will
14 permit Fischlin to be examined by the defense as well.

15 Again, the government is permitted to call these witnesses as
16 part of their case in chief, but nonetheless, the defense will
17 have the opportunity for cross-examination.

18 I believe that covers all the witnesses who have been
19 identified by the defense.

20 And Iacovetti was I-a-c-o-v-e-t-t-i, Fischlin is
21 F-i-s-c-h-l-i-n, and Marengo is M-a-r-e-n-g-o.

22 Any further clarification on the court's ruling as it relates
23 to these witnesses?

24 MR. BARBOSA: Just in terms of order of presentation,
25 you referred to it as the government's case in chief. Should I

1 assume that we will present testimony first?

2 THE COURT: Yes, counsel.

3 MR. BARBOSA: Okay. And the burden of proof lays with
4 the defense, I take it?

5 THE COURT: That is correct. I don't think the defense
6 is raising any challenges to burden of proof. Is that correct,
7 counsel?

8 MR. LEONARD: Not that I'm aware of, from my review of
9 the case law, Your Honor.

10 THE COURT: All right. Anything further, counsel?

11 MR. LEONARD: We will simply note our objection to the
12 court's ruling related to the other witnesses.

13 THE COURT: That's fine.

14 MR. LEONARD: Thank you, Your Honor.

15 THE COURT: The objection stands.

16 Anything else, counsel?

17 MR. BARBOSA: No, Your Honor.

18 THE COURT: Anything further from the defense?

19 MR. LEONARD: Nothing at this time, Your Honor.

20 THE COURT: All right. We will be at recess.

21 (Proceedings adjourned.)

22 C E R T I F I C A T E

23 I certify that the foregoing is a correct transcript from the
24 record of proceedings in the above-entitled matter.

25 Nickoline Drury
Nickoline Drury, Court Reporter